

The Honorable John C. Coughenour

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

BERNADEAN RITTMANN, <i>et al.</i> ,)	
)	Consolidated Action
Plaintiffs,)	Case No. 2:16-cv-01554-JCC
)	
v.)	JOINT STATUS REPORT RE LCR
)	37 SUBMISSION REGARDING
AMAZON.COM INC. and AMAZON)	PROPOSED SCHEDULE FOR
LOGISTICS, INC.,)	THIS CASE
)	
Defendant(s).)	
)	
)	

By Order dated September 15, 2022, the Court directed the parties to file a “joint proposed scheduling order, including deadlines for discovery, any potential motions to compel arbitration, and motions for class certification.” *See* ECF No. 234 at 4. The Court further ordered that “[i]f the parties are unable to agree, they may file a LCR 37(a)(2)(I) filing detailing any disputes associated with the proposed scheduling order.” *Id.*

The Parties were unable to agree on a schedule. Their respective proposed schedules are below along with their positions regarding the propriety of their proposals.

Plaintiffs’ Proposed Schedule: Plaintiffs propose the following schedule:

Discovery shall commence immediately, and the Parties can propound written discovery immediately.

- 1 • **Deadline for Exchange of Initial Disclosures:** October 12, 2022.
- 2 • **Deadline to File Consolidated Complaint:** No later than November 15, 2022.
- 3 • **Deadline for filing of Renewed Motion to Compel Arbitration:** January 16, 2023.
- 4 • **Deadline for filing of Class Certification Motion:** January 16, 2023.
- 5 • **Deadline for Completion of Fact & Expert Discovery:** 180 days from the date of the
- 6 Court's Class Certification Order.
- 7 • **Deadline for filing Motions for Summary Judgment:** 30 days after the close of
- 8 discovery.

9 Plaintiffs believe this proposal is superior to Defendant's proposal for several reasons.

10 First, Plaintiffs' proposal allows for discovery to commence without further delay,
 11 including with the exchange of initial disclosures in several weeks. Plaintiffs see no reason to
 12 further delay basic exchange of Rule 26 disclosures or the propounding of written discovery
 13 now that the stay has been lifted (and six years have passed since this case was commenced).
 14 Defendants propose to defer any exchange of Rule 26 disclosures or other discovery until *next*
 15 *year* and until well after their Motion to Compel Arbitration and/or Dismiss is briefed. This
 16 proposal is unfair. Indeed, Plaintiffs wish to take some discovery into the various iterations of
 17 Defendants' arbitration agreement and when and how they were presented to drivers.
 18 Requiring Plaintiffs to respond to Amazon's Motion without any discovery is both inefficient
 19 and unfair. As such, discovery should commence immediately and briefing of Defendant's
 20 Motion should be briefly deferred until January.

21 Second, Defendants' proposal would have Amazon's Motion to Compel Arbitration
 22 being briefed and decided *before* any class certification briefing can even begin. This
 23 proposal is likewise inefficient and unfair. Whether certain drivers are bound to arbitrate is
 24 part of the class certification inquiry and will bear on what class is ultimately certified. It
 25 makes good sense to brief Defendants' Motion to Compel Arbitration in conjunction with
 26 class certification briefing, as numerous other courts have recognized. *See In re Evanston*

1 *Nw. Corp. Antitrust Litig.*, 2013 WL 6490152, *5 (N.D. Ill. Dec. 10, 2013) (holding that the
 2 court should first consider the propriety of class certification and then determine which class
 3 members, if any, are bound to arbitrate)(collecting cases). Defendants no doubt intend to
 4 appeal as of right from any denial of their Motion to Compel Arbitration and to seek (yet
 5 another) stay pending that appeal. As such, Defendants' proposed schedule is simply a
 6 further attempt to build delay into the schedule and avoid any important briefing on issues of
 7 class certification or the merits for as long as possible.¹

8 Plaintiffs strongly urge the Court to adopt their proposed schedule. This schedule is
 9 preferable because it will allow for discovery to begin immediately (including crucial
 10 discovery regarding Amazon's arbitration agreement, when and why it was changed over
 11 time, and how it was presented to new and existing Amazon Flex drivers – which Plaintiffs
 12 need *before* opposing Amazon's forthcoming Motion). At a minimum, even if the Court does
 13 not adopt Plaintiffs' schedule in full, it should at least permit discovery to begin immediately,
 14 as without basic discovery, Plaintiffs will be hamstrung in their ability to respond to
 15 Amazon's forthcoming Motion to Compel Arbitration.

16 Moreover, there are some Plaintiffs and opt-in plaintiffs who opted out of Amazon's
 17 arbitration clause altogether or who were only ever bound by early versions of the clause,
 18 which this court has already held to be unenforceable. Thus, regardless of the outcome on
 19 Amazon's forthcoming Renewed Motion to Compel Arbitration, there are some claims and
 20 plaintiffs that *will be moving forward before this court*. Some of these plaintiffs have not
 21 driven for Amazon for years at this point, and further delaying discovery into their claims
 22 risks that evidence will be stale, inaccessible, or destroyed. Given the amount of time that has
 23 elapsed and the fact that some plaintiffs are indisputably *not* bound to arbitrate – a point

24
 25 ¹If Defendants would commit to *not* seek a stay pending appeal of any denial of their forthcoming Renewed
 26 Motion to Compel Arbitration, their proposal might be more palatable. But as it stands, Plaintiffs firmly believe
 Amazon's forthcoming Motion to Compel Arbitration to be wholly frivolous for the reasons set forth in prior
 filings, *see* ECF No. 225 at 2-5, and Amazon's proposed schedule to be a transparent attempt to set up another
 lengthy, indefinite stay of this case while it appeals from the denial of its Motion.

1 Amazon does not and cannot dispute – there is no reason to delay basic discovery and initial
2 disclosures any further.

3 Amazon objects that Plaintiffs’ schedule is inappropriate because it provides
4 insufficient time for briefing of Amazon’s anticipated Rule 12 motion. But, as the Court’s
5 prior orders in this case make clear, there are some claims in this case that have already
6 survived a motion to dismiss and will be proceeding on the merits. Amazon is free to prepare
7 and file a Motion to Dismiss the Consolidated Complaint (which Plaintiffs hope to file as
8 soon as possible and no later than November 15). However, regardless of the outcome of that
9 Rule 12 Motion, past rulings make clear that many if not all of the claims at issue will survive
10 and continue before this Court. As such, there is no reason to unduly delay discovery or
11 briefing of important issues like class certification.

12 Plaintiffs’ proposed schedule would also provide the Parties the opportunity to
13 concurrently brief the Class Certification Motion and Motion to Compel Arbitration,
14 beginning early next year, after some discovery has occurred. Amazon objects that this
15 schedule provides insufficient time for discovery it will need in opposing Class Certification.
16 But if discovery commences immediately, the Parties will have more than one-hundred (100)
17 days to take discovery related to class certification *and* arbitration issues. As set forth above,
18 determining which drivers, if any, are bound to arbitrate will naturally be part of the class
19 certification inquiry, and the Court can address the propriety of class certification along with
20 the scope of the class, at that juncture, after which the Parties will proceed to complete
21 discovery regarding the certified class.

22 **Defendants’ Proposed Schedule:** Amazon proposes the following schedule to stage
23 proceedings in the interest of efficiency, first setting the Rule 12 and Motion(s) to Compel
24 Arbitration to be resolved prior to setting further deadlines:

- 25 • **Deadline to File Consolidated Complaint:** No later than October 17, 2022
- 26 • **Deadline for Rule 12 Motion/Motion(s) to Compel Arbitration:** November 17

- Opposition deadline: December 8
- Reply deadline: December 22
- **Deadline for Exchange of Initial Disclosures:** January 16, 2023
- **Class Certification Deadlines** – to be set following resolution of Rule 12 motions/MTCA and after filing of an answer:
 - Deadline to complete class certification fact discovery – 60 days before deadline to file motion for class certification.
 - Deadline to complete class certification expert discovery – 30 days before deadline to file motion for class certification.
 - Deadline for filing Class Certification Motion – TBD.
 - Opposition deadline: One month after class certification motion.
 - Reply deadline: two weeks after opposition.
- **Deadline for Completion of Fact & Expert Discovery:** days from the date of Class Certification Order.
- **Deadline for filing Motions for Summary Judgment:** 30 days after the close of discovery, 90 days prior to the trial date.

There are many reasons why this Court should reject Plaintiffs’ proposed schedule and adopt Amazon’s proposed schedule.

First, Plaintiffs’ proposal fails to account for Defendants’ anticipated Rule 12 motion in response to Plaintiffs’ consolidated complaint. This Court previously granted Defendants’ Motion to Dismiss Plaintiffs Rittmann, Carroll, Wehmeyer, and Lawson’s minimum wage, overtime and willful withholding claims on the grounds that they failed to comply with the pleading standard set forth in *Landers v. Quality Communications, Inc.*, 771 F.3d 638 (9th Cir. 2014). ECF No. 76. The consolidated complaint will include additional Plaintiffs and claims, many of which have not been previously tested before this Court. Defendants should

1 not be required to brief – and the Court should not be required to consider – whether claims
 2 should be certified for class treatment before the parties know whether those claims pass
 3 muster under Rule 12. Setting class certification deadlines to follow just two months after the
 4 yet to be filed consolidated complaint, before Defendants and this Court can review and test
 5 the sufficiency of the pleadings, is simply premature. *Cf.* ECF No. 193 (finding Plaintiff
 6 Mack’s early motion for partial summary judgment “premature” because “as a result of the
 7 stay and new pleadings, Defendants have not filed an operative answer, the Court has not yet
 8 issued a discovery and scheduling order, and discovery has not yet begun”).

9 *Second*, in the interests of efficiency and consistent with arbitration agreements
 10 between Amazon and the Plaintiffs and opt-in Plaintiffs, Defendants propose for the issue of
 11 arbitrability to be decided before class certification.² *See e.g., Reyna v. Int’l Bank of*
 12 *Commerce*, 839 F.3d 373, 377 (5th Cir. 2016) (“[A] district court must consider an agreement
 13 to arbitrate as a ‘threshold question.’ ”); *Bogle v. Wonolo Inc.*, No. 2:21-CV-08878-MCS-KS,
 14 2022 WL 1124973, at *4 (C.D. Cal. Apr. 8, 2022) (“Whether named and opt-in plaintiffs must
 15 arbitrate their claims ‘should be decided well before the nationwide notification issue is
 16 reached.’”) (quoting *Reyna*, 839 F.3d at 377); *Hughes v. S.A.W. Ent., LTD*, No. 16-CV-03371-
 17 LB, 2017 WL 6450485, at *9 (N.D. Cal. Dec. 18, 2017) (“[T]he issue of whether the named
 18 plaintiffs can litigate their claims in a court or must arbitrate their claims is a threshold issue.
 19 If the arbitration provisions the named plaintiffs signed with the defendants are enforceable,
 20 the plaintiffs cannot pursue these cases in court on behalf of either themselves or other[s] . . .
 21 .”); *Castle v. Wells Fargo Fin., Inc.*, 2007 WL 703609, * (N.D.Cal. Mar. 5, 2007) (“[T]he
 22 better course is to first determine the enforceability of the arbitration agreements before
 23 addressing the scope and management of the remainder of this litigation.”)

24 _____
 25 ²Amazon’s forthcoming Motions to Compel Arbitration are not “wholly frivolous” as Plaintiffs baselessly
 26 contend. Amazon previously explained its grounds in the Parties’ August 19, 2022 Joint Status Report. ECF
 No. 231 at n.6. Indeed, it is far from frivolous. Applying *Saxon*, the Fifth Circuit recently held “that local
 delivery drivers are not so ‘engaged’ in ‘interstate commerce’ as § 1 contemplates.” *Lopez v. Cintas Corp.*, 47
 F.4th 428, 432 (5th Cir. 2022).

1 Plaintiffs' proposal to concurrently decide arbitrability and class certification is
2 untenable. Plaintiffs mischaracterize arbitration as an issue limited to whether the non-party
3 class members can participate in the class action, but this is not accurate. The issue in
4 Defendants' forthcoming Motion(s) to Compel is whether numerous Plaintiffs (including
5 many dozens of opt-in Plaintiffs) are entitled to litigate before this Court, under the recent
6 Supreme Court rulings in *Southwest Airlines Co. v. Saxon*, 142 S. Ct. 1783 (2022), and in
7 *Viking River Cruises, Inc. v. Moriana*, 142 S. Ct. 1906, 1925 (2022), and their progeny
8 including *Lopez v. Cintas Corporation*, 47 F.4th 428 (5th Cir. 2022) (rejecting *Rittmann*
9 analysis as inconsistent with *Saxon*).

10 *Third*, to the extent that Plaintiffs survive the forthcoming Motion to Dismiss and
11 Motion(s) to Compel Arbitration and could proceed with a Motion for Class Certification,
12 Plaintiffs' proposed schedule fails to provide adequate time for the parties to conduct
13 discovery before that Motion. Plaintiffs' proposal would improperly deprive Amazon of the
14 ability to adequately prepare its Opposition to Class Certification. *Vinole v. Countrywide*
15 *Home Loans, Inc.*, 571 F.3d 935, 942 (9th Cir. 2009) (quoting *Kamm v. Cal. City Dev. Co.*,
16 509 F.2d 205, 209 (9th Cir. 1975)) ("The propriety of a class action cannot be determined in
17 some cases without discovery," and that "the better and more advisable practice for a District
18 Court to follow is to afford the litigants an opportunity to present evidence as to whether a
19 class action was maintainable."); *Nevarez v. Forty Niner Football Co., LLC*, 2018 U.S. Dist.
20 LEXIS 2415, at *4 (N.D. Cal. Jan. 5, 2018) ("Courts generally recognize the need for pre-
21 certification discovery relating to class issues."); *Macpherson v. Firth Rixson Ltd.*, No. 12-
22 CV-6162, 2012 WL 2522881, at *2 (W.D.N.Y. June 28, 2012) ("Courts are to determine
23 whether to certify an action as a class action at an early practicable time . . . However, a
24 decision about certification need not be made at the outset; a court should delay a certification
25 ruling until information necessary to reach an informed decision is available.") (citing Fed. R.
26 Civ. P. 23(c)(1) advisory committee notes to 2003 amendments). Plaintiffs' proposal to allow

1 Amazon a mere two months to take discovery after Plaintiffs file their consolidated complaint
2 and before they file their Motion for Class Certification, some of which time falls over the
3 holidays, in a case that Defendants anticipate will continue to allege (at a minimum) Rule 23
4 claims for five states, nationwide common law claims, and nationwide FLSA claims on behalf
5 of over one hundred named Plaintiffs and opt-in Plaintiffs, all while the Parties would be
6 concurrently briefing their Motion to Dismiss and Motion(s) to Compel Arbitration, is
7 untenable.

8 *Fourth*, regarding initial disclosures and discovery, Plaintiffs' complaint that
9 Defendant's proposal is "unfair" is not well taken. Amazon proposes that the parties
10 exchange disclosures in January after Plaintiffs file their consolidated complaint. In contrast,
11 Plaintiffs would exchange disclosures before the consolidated complaint is even filed. At a
12 minimum, the identity of the Plaintiffs, their corresponding alleged claims, and the supporting
13 factual allegations should be known to Amazon in advance of the disclosure deadline, so that
14 Amazon has a fair and reasonable opportunity to disclose relevant witnesses and documents.
15 Any need that Plaintiffs might demonstrate for arbitration-related discovery might justify
16 extending their deadline for opposing Amazon's forthcoming Motion(s), but cannot justify
17 requiring Amazon to make disclosures before the filing of the operative pleading. Further,
18 Plaintiffs' counsel already are well aware of amendments to Amazon's Terms of Service
19 (TOS) as applicable to the arbitration agreement from filings in this consolidated case, *see*,
20 *e.g.*, *Rittmann v. Amazon.com, Inc.*, Dkt. #37 (attaching TOS versions in effect through Oct.
21 2019), *Diaz v. Amazon.com, Inc.*, No. 2:21-cv-00419-JCC at Dkt. #48-1 (attaching Oct. 2019
22 TOS "in effect throughout all of 2020 and into 2021"), as well as from those Plaintiffs who
23 remain Delivery Partners and therefore have access to the most-recent version of the TOS.
24 Moreover, Amazon has no objection to providing all applicable versions of the TOS to
25 Plaintiffs well before they have to oppose the motion to compel arbitration.
26

1 As a final matter, Amazon intends to seek an order or orders compelling arbitration for
2 over ninety Plaintiffs and opt-ins, who hail from more than a dozen states and are subject to
3 several different versions of the Amazon Flex terms of service. Amazon requests guidance as
4 to whether it would be more useful to the Court to entertain individual motions to compel
5 arbitration addressing the particular circumstances of each individual (or each group of
6 similarly situated individuals) or an omnibus motion to compel arbitration, in which case
7 Amazon would respectfully request an increased length limit of 40 pages.

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Respectfully submitted,

s/ Todd L. Nunn

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CERTIFICATION

I certify that the full response by the responding party has been included in this submission, and that prior to making this submission the parties conferred to attempt to resolve this discovery dispute in accordance with LCR 37(a).

s/Adelaide Pagano

Adelaide Pagano

CERTIFICATE OF SERVICE

I hereby certify that I caused to be electronically filed the foregoing JOINT STATUS REPORT with the Clerk of Court using the CM/ECF system, which will automatically send email notification of such filing to the registered attorneys of record.

DATED: September 30, 2022

s/Todd L. Nunn

Todd L. Nunn